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December 22nd, 2022

To: Hon. Robert M. Levy
United States Magistrate Judge
225 Cadman Plaza E.
Brooklyn, NY 11201
via ECF

Re: Response to Plaintiffs' Application for Leave to Move for Rule 37(e)
"Sanctions," Case No. 1:20-CV-03627-RPK-RML, 192 Morgan Realty v.
Aquatorium et al.

Dear Judge Levy:

Today, Plaintiffs/Counterclaim Defendants (hereafter, "Landlords") move for relief under Rule 37(e) against my client, Clear Blue Waters Project, LLC ("CBWP") in relation to failure to preserve ESI. ECF No. 79.

As necessary context, the Court should be made aware that Landlords were served a Rule 11(c)(2) "safe harbor notice" on December 16th, 2022. Discovery has uncovered extremely serious misconduct by Landlords and their attorney within this proceeding, including: 1) lying to the Court on the record (most recently, at the December 7th, 2022 hearing) and lying to CBWP in written discovery as to who owns and manages their business entities, 2) filing fraudulent verifications for their complaints, and 3) filing fraudulent affidavits attached to motions. The "safe harbor" period ends January 6th, 2022, and CBWP will move the Court for terminating sanctions at that time.

With this in mind, Landlords' strategy appears to be to get a "head start" on "sanctions" motions. My client's owner did testify that a "WhatsApp" conversation had *inadvertently* gone missing when she switched phones. Landlords may well be entitled to some minor relief *if* the conversation cannot be recovered *and* Landlords can demonstrate that its absence may prejudice their case. However, discovery is still open

and it is still possible that the conversation may be recovered, *e.g.*, perhaps the other end of the conversation is still in possession of these messages and may be subpoenaed to provide them.

Because discovery is still open and it is still possible that the ESI may be recovered, Landlords' request is premature and should be denied with leave to refile after discovery has closed. Landlords' request to file such a motion right now is merely a distraction to the impending trouble they face after the safe harbor period ends.

Respectfully,

/s/Jonathan Corbett

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